Australian Government

Department of Health, Disability and Ageing

ALRC Review of Surrogacy Laws – Discussion paper

Submission from the Department of Health, Disability and Ageing to the Australian Law Reform Commission

The Department of Health, Disability and Ageing (department) welcomes the opportunity to make a further submission to the Australian Law Reform Commission's (ALRC) Review of Surrogacy Laws. This submission responds to the discussion paper released in November 2025. The department consulted with the following portfolio agencies in the preparation of this submission: National Health and Medical Research Council (NHMRC), the Australian Commission on Safety and Quality in Health Care (ACSQHC) and the Australian Institute of Health and Welfare (AIHW). The NHMRC will also provide a separate submission.

The department's July 2025 submission in response to the ALRC's issues paper noted the Australian Government recognises the importance of ensuring access to sexual and reproductive health information, treatment and services that empower individuals to have choice and control in decision-making about their bodies. It outlined responsibility for the assisted reproductive technology (ART) sector in Australia is a complex issue that spans across Commonwealth, state, and territory governments. The Australian Government primarily has a funding role through the contribution of funding to ART services via the Medicare Benefits Schedule (MBS), the Pharmaceutical Benefits Scheme (PBS), and the National Health Reform Agreement (NHRA), which helps fund state and territory health services. It also noted the NHMRC has established ethical standards for the clinical practice of ART.

The ALRC review of surrogacy is taking place concurrent with work responding to recommendations made from the rapid review of the regulatory and accreditation arrangements in place for the ART sector and its in vitro fertilisation (IVF) clinics. A report on the rapid review was provided to all Health Ministers in September 2025. At that meeting, Health Ministers agreed the ACSQHC should provide independent accreditation for ART services, against updated national standards. These will include performance monitoring metrics, workforce and staffing guidance, and clearer complaints pathways. The new accreditation requirements are expected to be developed by January 2027 and fully operational by December 2028. This work will complement state and territory regulation, which remains crucial in protecting consumers and ensuring ethical and transparent delivery of ART services.

Health Ministers also agreed to undertake national engagement with consumers, donors, and donor-conceived people to inform reform design. This will ensure inclusive, co-designed policy development, exploring emerging concerns such as informal sperm donation and donor limits. Health Ministers endorsed referring to the ALRC a request to review relevant legislation with a view to modernising and moving towards consistent state legislation. This aligns with the existing ALRC reviews into surrogacy and human tissue laws.

It is noted that the Australian Charter of Healthcare Rights, developed by the ACSQHC and which includes information about healthcare access and privacy for consumers, has not been mentioned in the discussion Paper. This charter may be relevant in relation to the proposed legislative requirements.

Intersectionality

The department supports equitable access to legal and health services including surrogacy for people with disability and other intersectional groups within Australia. The department also acknowledges the need for safeguards for people who may be more vulnerable following changes to the law arising from this review.

Australia's Disability Strategy 2021-2031 (Australia's Disability Strategy) sets out a vision for an inclusive Australian society that ensures people with disability can fulfil their potential as equal members of the community. The proposed changes to the surrogacy laws relate to the *safety, rights and justice*; *personal and community support health and wellbeing*; and *community attitudes* outcome areas under Australia's Disability Strategy. It is vital that ableist attitudes on surrogacy are not embedded in the legal or health system, including associated supports and services.

Surrogacy data collection

The AIHW's National Perinatal Data Collection contains one voluntary data item on ART (whether the pregnancy was the result of ART – yes / no / not stated), with data provided by 4 of 8 jurisdictions. Most ART data is handled by the National Perinatal Epidemiology and Statistics Unit who run the Australian and New Zealand Assisted Reproduction Database (ANZARD). The discussion paper is silent on the collection of data in relation to surrogacy. Enhanced data collection in relation to surrogacy in Australia, including success rates and in relation to adherence with any regulatory systems, should be considered in the roles for a National Regulator.

Input responding to specific questions and proposals of the discussion paper

Proposals 25 and 26

The NHMRC is Australia's leading expert body in health and medical research and ensures all people in Australia have access to evidence-based, authoritative health advice. It is also responsible for developing and supporting high quality guidelines for clinical practice, public health, environmental health and ethics.

The Australian Government has established the NHMRC Australian Health Ethics Committee (AHEC) as the body to advise on ethical issues regarding human health. AHEC, through the *Ethical guidelines on the use of assisted reproductive technology in clinical practice and research*[1] (ART Guidelines), advises that it is ethically unacceptable to allow commercial (or compensated) surrogacy where the surrogate receives financial compensation above and beyond expenses associated with the surrogacy procedure and pregnancy. On this basis, proposals 25 and 26 in the discussion paper are considered ethically unacceptable under current Australian guidelines.

In Australia, all persons and bodies offering ART services must be accredited by the recognised accreditation body, the Fertility Society of Australia and New Zealand's Reproductive Technology Accreditation Committee (RTAC), or another body prescribed

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[1] National Health and Medical Research Council, Ethical guidelines on the use of assisted reproductive technology, 2017 (updated 2023), accessed 3 December 2025

by the *Research Involving Human Embryos Regulations 2017*. The accreditation of ART clinics by RTAC requires clinics to comply with the ART Guidelines.

Section 8 of the ART Guidelines address practices that raise specific ethical issues including surrogacy. For ART activities requested under a surrogacy arrangement, sections 8.8 to 8.12 of the ART Guidelines are relevant.

The term ‘altruistic surrogacy’ is defined in the ART Guidelines as “an arrangement where the surrogate receives no financial compensation or inducement, beyond the reimbursement of verifiable out-of-pocket expenses directly associated with the surrogacy procedure, pregnancy or birth”[2].

The ART Guidelines support altruistic surrogacy, where clinics are responsible for ensuring the surrogacy arrangement is ethically acceptable. While it is not the role of clinics to provide legal advice, clinics must not facilitate ART treatment under a surrogacy arrangement if there are concerns about whether the arrangement is ethical and/or legal. The ART Guidelines further sets out requirements relating to consent, exchange of information and reasonable out-of-pocket expenses. This guidance was published in the 2017 update to the ART Guidelines after public consultation (refer to appendix 4 of the ART Guidelines).

The ART Guidelines do not support the practice of commercial surrogacy. Clinics and clinicians must not practise, promote or recommend commercial surrogacy, nor enter into contractual arrangements with commercial surrogacy providers[3].

The ALRC’s final report would benefit from more clearly highlighting the Australian ethical position on reimbursement for surrogacy. Further details about the ethical framework relating to surrogacy are included in a separate submission from NHMRC to ALRC’s Review of Surrogacy Laws.

Proposal 28 and 29

As provided in the department’s July 2025 submission, the Australian Government remains committed to supporting Australians to access high quality and affordable health care by providing both free and subsidised health care services. This includes providing Medicare benefits (rebates) for privately rendered services listed on the MBS. There are 14 items on the MBS for ART services including for IVF. More information on relevant MBS items can be found on MBS Online, at www.mbsonline.gov.au.

In addition, the MBS funds a range of items which enable patients to receive advice and services which support their potential ART journey. This includes, for example, GP attendance items as well as specialist services delivered through gynaecologists and infertility specialists, and obstetric care.

In February 2025, the Australian Government handed down its response to the Senate community affairs references report ‘Ending the postcode lottery – addressing barriers to sexual, maternity and reproductive healthcare in Australia’. Recommendation 33 was

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[2] ibid

[3] National Health and Medical Research Council, Ethical guidelines on the use of assisted reproductive technology, 2017 (updated 2023), accessed 3 December 2025

for the removal of the exclusion of IVF services for altruistic surrogacy purposes. The response noted that the Australian Government supports in-principle Recommendation 33 and will give further consideration to implementation issues relating to this recommendation, including the scope of any legislative or other changes that may be required.

Recommendation 33 and prior recommendations from the MBS Review Taskforce's review of MBS Gynaecology items 11 are specific in recommending Government consider removing MBS restrictions <u>relating to altruistic surrogacy only</u>.

Question A - What are important design principles or safeguards for any regulatory body to have?

A trauma-informed approach should be adopted, recognising the wide-ranging forms of trauma which may impact a person's interaction with health services, regulatory agencies, and reproductive journey including but not limited to previous pregnancy loss, experiences of violence, living with disability, intergenerational trauma and distrust of health and legal services.

Regulatory bodies must design policies, services, and safeguards that are inclusive, accessible and meet the needs of all people. This includes engagement with diverse and intersecting communities to ensure their voices are heard. Australia's Disability Strategy's guiding principles provide useful guidance in this regard. Principles include:

- Respect for inherent dignity and individual autonomy
- Non-discrimination
- Full and effective participation and inclusion in society
- Accessibility
- Equality of opportunity
- Respect for difference and acceptance of disability as part of human diversity.

Representation in governance: Regulatory bodies must deliberately include diversity within consultative forums, committees, boards, and leadership roles. This ensures diverse perspectives are embedded in decision-making and oversight.

Safeguards against discrimination: Regulatory frameworks must actively prevent discrimination and ensure that people are not subject to additional scrutiny or barriers. For example, assessments or requirements (such as psychological assessments) must be disability responsive, trauma-informed, and culturally safe.

Question D - Should both the surrogate and the intended parent(s) be required to undergo a psychological assessment?

The department considers the inclusion of a psychological assessment for the surrogate to be an important safeguard that supports preparation and promotes wellbeing throughout the process. To strengthen the proposal, it should explicitly state that psychological assessments must be conducted in a manner that is responsive, trauma-informed (consistent with the principles outlined in the response to Question A, paragraph 1), and safe for all individuals including those with disability and from diverse backgrounds. Psychological assessments should not disadvantage people with disability or mental illness.

The requirement for psychological assessment of intended parent(s) is less clearcut but on balance the department would support psychological assessment of the parent(s) as it would help manage the risks identified in point 127. It is positive that the proposal specifies the assessment should not be used to determine parental fitness, but rather to ensure emotional and psychological capacity to participate in the surrogacy arrangement without undue risk to their own or another persons health or wellbeing.

The department notes that proposal 21 states that all parties must undergo counselling before entering a surrogacy agreement and lists what must be considered. It is stated this must not be provided by the person who does the independent assessment. However, the psychological assessment cannot be meaningfully done without exploring many of the issues raised in proposal 21. If the assessment and the counselling are to be done by two separate people then we would suggest the counselling occur first, to inform the assessment.

Question H - In relation to surrogacy agreements, should, any: other subject matter or requirements be included; of the subject matter or requirements identified be removed; clauses be prohibited, taking into account Proposal 23

Regarding the inclusions at Proposal 23 (referenced in Question H), the department does not comment on these inclusions but notes that all surrogacy agreements must be clear, concise and in plain language not in legal jargon; or that a plain language version must also be provided. This must apply irrespective of whether a person involved is identified as having a disability or limited English language skills. Information about and supporting all of the threshold requirements must be accessible, inclusive and provided in formats of choice. This includes language of choice (such as Auslan) and Easy Read versions. All information and communication must support section 6 of the *Disability Discrimination Action 1992* and that online communication products must also comply with the key principles of Web Content Accessibility Guidelines 2.2.

Question M - Should legislation allow intended parents to pay the surrogate an additional support payment beyond reimbursement for the costs and losses outlined in Proposals 25 and 26, to recognise the surrogate's time, effort, inconvenience, and unique contribution to the surrogacy arrangement?

As noted earlier, the NHMRC's ART Guidelines do not support the practice of commercial surrogacy which is considered ethically unacceptable under the current Guidelines. The Government's consideration of removing MBS restrictions relates to altruistic surrogacy only. Making an additional payment optional, or case by case, increases risk of both the surrogate and the prospective parents being taken advantage of and raises serious ethical concerns. Any financial incentive to provide surrogacy services has the potential be exploitative towards vulnerable population groups in Australia.

Further, intending parents may struggle financially due to factors like lower income, employment insecurity, cultural obligations to support extended family, or health expenses. Allowing additional payments may perpetuate inequality by adding to the cost of ART which is already an expensive undertaking. The 2b hardship payment would be an unknown amount until after the fact, making the total cost of the surrogacy arrangement hard to quantify.

The wording of Proposal 25 is more definitive, that these costs must be paid. This is also problematic in a situation where the surrogate genuinely does not want or need to be paid (e.g. as may be the case for a parent or sibling who is the surrogate). Making these payments optional has the same complications as outlined above.

Question R - In relation to Proposal 34, does it capture all the appropriate and relevant information that should be included on the surrogacy register; and who should be responsible for providing that information?

Caution should be applied in relation to capturing information about physical characteristics, including characteristics that are disability related. ‘Physical characteristics’ would need to have a defined list. It is not clear what the relevance of collecting information about the physical characteristics of the surrogate, beyond this being a ‘right to know’ about people who contributed to one’s birth. Caution is needed if this is intended to be a proxy for other genetic/familial information about a traditional surrogate (who uses their own egg) which would otherwise be captured on a donor register where they exist. This provision potentially gives people born through surrogacy access to more donor information than is available to people born through other egg and sperm donation arrangements.